UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

STARBUCKS CORPORATION, **Employer,** **and** **WORKERS UNITED,** **Petitioner.**	**Case Nos.** **03-CA-285671** **03-CA-290555** **03-CA-291157** **03-CA-291196** **03-CA-291197** **03-CA-291199** **03-CA-291202** **03-CA-291377** **03-CA-291378** **03-CA-291379** **03-CA-291381** **03-CA-291386** **03-CA-291395** **03-CA-291399** **03-CA-291408** **03-CA-291412** **03-CA-291416** **03-CA-291418** **03-CA-291423** **03-CA-291431** **03-CA-291434** **03-CA-291725** **03-CA-292284** **03-CA-293362** **03-CA-293469** **03-CA-293489** **03-CA-293528** **03-CA-294336** **03-CA-293546** **03-CA-294341** **03-CA-294303** **03-CA-296200** **03-RC-282127**

STARBUCKS' OPPOSITION TO THE GENERAL COUNSEL'S RENEWED MOTION FOR EVIDENTIARY SANCTIONS

Starbucks Corporation ("Starbucks") submits this response in opposition to the Counsel for the General Counsel ("General Counsel") of the National Labor Relations Board's ("Board") Renewed Motion for Evidentiary Sanctions.

I. INTRODUCTION

In yet another attempted bite at the apple, the General Counsel has renewed her motion for sanctions. Rather than attempt to enforce her subpoena in federal court, the appropriate venue, the General Counsel comes to Your Honor just *two days* after your prior ruling issuing a discovery sanction. In her new motion, the General Counsel misrepresents both Your Honor's prior rulings and the facts in an attempt to obtain draconian and inappropriate sanctions to tilt the tables further in her favor (and away from the merits) by tying Starbucks' hands when it tries to defend itself.

The General Counsel fails to demonstrate any prejudice or basis for requested sanctions. She fails to show why she needs requested documents for the particular witnesses taking the stand in her case next week. Instead, she merely anticipates finishing her case in chief earlier than expected, over one month from now. But why did the General Counsel file this renewed motion yesterday and request a hurried ruling, in the middle of Starbucks' rolling production, that the ALJ has approved in his prior rulings?

The General Counsel is aware that Starbucks already produced over 5,000 pages of documents before the instant motion was filed, is producing over 1,600 more pages today, and still intends to produce thousands of additional pages by the end of the month (i.e., by this Sunday), and on an ongoing basis, as promised. However, she complains now – before more documents are produced – about a purportedly small number of "documents" received compared to a large number of "pages" expected. (When it suits her, the General Counsel refers to "documents" or

"items" as the smaller number, even though one item – like an entire personnel file – may contain numerous pages, and she avoids acknowledging that Respondent has produced over 5,000 "pages" of documents.)

At the core of the renewed motion are the General Counsel's twin misrepresentations of fact: (1) that Starbucks has only produced – 158 "items"; and, (2) that Starbucks has said it is "likely to . . . produce[] . . . some 20 million responsive documents." (Motion, p. 3). First, Starbucks already produced 5,012 pages of documents prior to the instant Motion being filed. The General Counsel knew that Starbucks was going to produce thousands of additional pages later this week because Starbucks has told the General Counsel and this tribunal all along they would endeavor to do so, including this week. Second, Starbucks has *never* said it will produce 20 million documents. Rather, Starbucks has repeatedly noted that the General Counsel's overly broad subpoenas as written, will "potentially implicat[e]" up to 20 million pages of documents for Starbucks to have to "locate, retrieve, and review." (*See* Starbucks' Opposition to GC's Motion for Evidentiary Sanctions, pp. 1, 4). That is why the overbroad requests created an undue burden. Obviously, not all documents reviewed will be responsive and produced, due to duplication, irrelevance, and privilege, etc.

The General Counsel's complaint that Starbucks is purportedly going to produce 20 million documents is both false and ironic. (Motion, p. 9). The General Counsel complains that having to review 20 million pages of documents would be "of astounding proportions" and would overwhelm her staff. Yet, this is *exactly* what her subpoenas demand Starbucks do – and perfectly catalogue – on a shortened timetable, all while simultaneously defending itself in "the largest case in history."

Further, the General Counsel complains that Starbucks' production is not organized to her liking because Starbucks did not identify which document was responsive to which request. (Motion, p. 9). The General Counsel's proposal is that Starbucks perfectly catalogue what is produced with a Dewey decimal-like system for the General Counsel to be able to cross-reference every one of the thousands of documents produced to each request to which it might be responsive. (Motion, pp. 15-16). She does so despite knowing that her subpoenas contain well over 150 requests, many overlapping with each other. Such a cumbersome reference system is not required by any legal authority. *See* Fed. R. Civ. P. 34(b)(2)(E)(i) (explaining that Rule 34(b) of the Federal Rules of Civil Procedure requires a party responding to a request for production of documents to produce responsive documents in the form in which they are ordinarily maintained *or* organize and label them to correspond with the categories of the request for production). Not to mention, Starbucks has *already offered* – again, as the General Counsel is aware – to provide an index of what is being produced. This would catalogue the Bates number, document name or description, and production date.

While there is no obligation to produce an index, especially when Starbucks is faced with continued motion practice, an index will be provided to the General Counsel today. However, the General Counsel attempts to override Respondent's ability to choose to produce documents in their ordinary course (as it is entitled to do under Rule 34). Instead, she inappropriately demands in her Motion (and in definition 24 of her Subpoena Instructions) that counsel for Starbucks be forced to identify more than what is listed in the current indices, to an extent that would invade the attorney work product privilege protecting Starbucks from having to reveal how its attorneys selected and compiled documents and their mental impressions and strategy. All that is required is production

of documents as they are kept in the ordinary course, and that is what Starbucks has done – and then some, by offering its document production index in good faith.

The General Counsel also complains that disciplinary documents were not produced within certain personnel files (e.g., citing the one "document" or "item" of Alexis Rizzo's personnel file). (Motion, p. 7). This is because Starbucks is going to separately produce a number of corrective actions that were kept separately from some of the personnel files at particular stores, in the ordinary course of business. Moreover, this argument is completely disingenuous as the record demonstrates that the General Counsel has in her possession all relevant documents. First, the Third Amended Complaint itself sets forth Starbucks policies directly from the Partner Guide. Second, the General Counsel introduced more than 50 documents at the hearing within a matter of 8 days. Further, during Angel Krempa's testimony, the General Counsel introduced 10 exhibits directly related to Ms. Krempa's employment and termination, including phone logs and screen shots of her time and attendance issues. However, despite Krempa testifying to taking 5 recordings during her employment, they decided to only introduce 4 audio recordings, with transcripts. With respect to witness Cohen, the General Counsel produced various pictures of GroupMe chats, pictures of a posting and a video of a reset. None of the documents that the General Counsel has used to date, have been produced to Starbucks prior to the hearing as the General Counsel would not comply with the various Subpoenas issued to her.

There is clearly no prejudice to the General Counsel and in fact, the 8 days of hearing have established that Starbucks is in fact the prejudiced party – the General Counsel has all the records she needs to pursue her case, consistent with what was alleged in Federal Court – yet she daily threatens sanctions if she does not obtain documents that amount to nothing more than a fishing expedition.

The General Counsel also misrepresents Your Honor's prior rulings. At page 6, and again at page 12 of her renewed motion, the General Counsel incorrectly asserts that your prior orders have "ruled on" and "uphold[]" the instructions in the General Counsel's subpoenas to Starbucks, including her instruction purporting to require counsel for Respondent to identify to which of her many requests every document produced is responsive." This blatantly misrepresents your prior rulings, including the July 9 Order, perhaps in the hope that repeating the falsehood enough times will make it come true. One wonders why – if you already ordered Respondent to comply with her subpoena instructions as she claims – the General Counsel now needs an order from you "(1) requiring Respondent to produce documents in accordance with all subpoena instructions...." (Motion, p. 15). It is because no such order exists. The General Counsel makes this misrepresentation in order to set up her argument that pre-trial discovery Rules 26 and 34, Fed. R. Civ. P., apply to and control Respondent's response (evidently, instead of Rule 45 - and notwithstanding her repeated arguments in the Petitions to Revoke that no prehearing discovery occurs in these proceedings, justifying her complete refusal to provide a single page of documents to Respondent prior to the hearing). She then argues that this non-existent prior "order" removes Respondent's ability under the plain language of Rule 34 to choose whether to produce documents as they are kept in the usual course of business *or* labeled to correspond to the request *categories* (i.e., not the particular document and particular request number). Regardless, none of the foregoing, including the language of Rule 34(b)(2)(E), would require Respondent to say which particular document corresponds to which particular request in the subpoenas or justify invading Respondent's work product protections.

There is no basis or even a common-sense articulation for why the General Counsel is requesting sanctions two days after the Court ruled on this request. The only circumstances that

have changed over the last two days are that Starbucks produced an additional 3,867 pages of documents. This hardly warrants any sanctions. The Motion should be denied.[1]

II. ARGUMENT

1. There Is No Basis For Sanctions

Board precedent is clear that evidentiary sanctions are inappropriate where, as here, a party is working in good faith to comply. In this case, any further evidentiary sanctions as Starbucks adds to over 5,000 pages already produced before today – and another 1,600 today, and many more coming in the next couple days - within the timeframe it said it would do so, would constitute the "drastic sanctions disproportionate to the alleged noncompliance" that the Board will reverse. *Sisters Camelot*, 363 NLRB 162, 169 (2015) (citing *Toll Mfg. Co.*, 341 NLRB 832, 836 (2004) and *Teamsters Local 917 (Peerless Importers*), 345 NLRB 1010, 1011 (2005)).

That Starbucks continues to produce thousands of pages of responsive documents on a rolling basis, as promised and as approved, is hardly evidence of egregious, deliberately obstructive behavior – rather, it is evidence of good faith compliance. That Starbucks is separately producing Corrective Actions from personnel files in a matter of days is not "presentation of selective evidence" justifying further sanctions. *See Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip. op. at 9 (July 11, 2018).

Rather, Starbucks is bending over backwards to diligently comply with the tribunal's order and outstanding subpoenas. It is doing precisely what it informed both the General Counsel and the tribunal it would throughout the hearing—produce the agreed upon documents in response to the subpoenas by the end of this month.

[1] If any sanction is warranted, it is for Starbucks' attorney's fees in having to defend this Motion.

The General Counsel's proposal that Starbucks perfectly catalogue its production so that she may cross-reference every one of the thousands of documents produced to each request to which it might be responsive, accounting for countless overlap, is cumbersome and a clear attempt to force Respondent to waste its time building such a system. It is not required by any law (much less warranting of any sanctions when not included). (Motion, pp. 15-16). Yet, when the General Counsel complained about the organization of Starbucks' production, Starbucks offered in good faith to provide an index of the production cataloguing Bates numbers, document names or descriptions, and production date, as the General Counsel is well aware.

Having made a sortable, text-searchable production of documents with a detailed metadata index, Starbucks "is not further obligated to organize and label them to correspond with [the General Counsel's] requests." *Zakre v. Norddeutsche Landesbank Girozentrale*, 2004 WL 764895 (S.D.N.Y. 2004); see also *Pass & Seymour v. Hubbell*, 255 F.R.D. 331 (S.D.N.Y. 2008) (holding that a request to organize said production by document request is "both unfair and unduly onerous."); *FDIC v. Giannoulias*, 2013 U.S. Dist. LEXIS 152092 (N.D. Ill. 2014) (where "Phase II production can be electronically sorted … using metadata", requiring the producing party "to organize its production according to the [requesting party's] numerous discovery requests would impose a substantial burden" and would not "serve any substantial purpose").

Moreover, Starbucks' diligence and good faith compliance efforts cannot be assessed in a vacuum. The General Counsel filed the operative Complaint one month ago. The present hearing only began on July 11, 2022. The Complaint contained over 300 allegations against Starbucks, making it, as the Union stated, "one of the largest complaints in U.S. history." Simultaneously, the General Counsel served over 150 broad requests in subpoenas immediately before the hearing

that the General Counsel initiated. In the past one month since the Complaint was filed, Starbucks has had to:

- Object to General Counsel's over 150 overbroad subpoena requests;
- File petitions to revoke, file an appeal, seek to submit the subpoenas to a special master to clarify parameters of reasonable requests to provide the needed judicial intervention to reign in the overbroad requests;
- Concurrently confer with General Counsel to try to decipher what it is they are requesting in their over 150 overly-broad requests;
- Come up with stipulations and agreements during meet and confers;
- Produce over 5,000 pages of documents pursuant to those stipulations, while simultaneously making rolling productions with several thousand more documents, including over the next three days.

Starbucks has done all of this while defending the over 300 allegations in this expedited hearing that the General Counsel has resisted Your Honor postponing, after she sat on her dozens of affidavits for months and for nearly a year after many of the underlying facts.

The recourse for alleged non-compliance of the subpoenas is for the General Counsel to go to federal court to seek to enforce them. Tellingly, the General Counsel has not tried to enforce the subpoenas in federal court.[2]

Regardless, Starbucks' actions over the past month while the General Counsel attempts to ambush it with the voluminous allegations and overbroad requests are certainly not "blatant disregard" for any subpoena warranting any sanction whatsoever.

2. The General Counsel Attempts to Distract from the Merits and Relitigate Sanctions Issues the Tribunal Already Addressed

Moreover, the General Counsel is relitigating issues the tribunal has already spent resources addressing. The General Counsel is making a second attempt for sanctions in an effort to gain the upper-hand and to distract from the ever-weakening foundation of her case. At the

[2] No federal court would begin to entertain enforcement of such broad requests, much less on the timetable or under the standards the General Counsel attempts to apply here.

hearing on July 12, 2022, Starbucks indicated it would produce the documents agreed to by the end of the month on a rolling basis, and Your Honor ruled the General's Counsel's motion for sanctions was premature and should be denied.

Further, Your Honor's July 25 Order – issued two days ago – partially granting the General Counsel's Motion for Evidentiary Sanctions – already addressed these same issues the General Counsel seeks to relitigate. Despite this, Your Honor issued limited sanctions rather than the General Counsel sought (and continues to seek 48 hours later). (Motion, p. 1). The Renewed Motion addresses the very document production, alleged organizational issues, and opportunity to gather documents after service of the subpoenas arguments that are ruled upon in ALJ Rosas' Order granting only some (but certainly not all) evidentiary sanctions. (Motion, pp. 16-21).

The only thing that has changed in the past 48 hours is that Starbucks has produced *more* documents *and* offered an index of the documents produced. In fact, while it is tucked into footnotes, the General Counsel concedes that Respondent has produced more than 300 additional documents – or 3,867 pages of its rolling production - during this 48-hour period. (Motion, p. 9 at n.8, p. 10 at n. 9). This production alone more than doubles the amount underlying Your Honor's Order for limited sanctions and only further evidences Starbucks' ongoing, good faith efforts to comply. This certainly is not a change in circumstances that could possibly justify any sanctions, much less the hyperbole in the Motion. *See Healthy Minds, Inc.*, 371, NLRB No. 6 (Jul. 15, 2021).

3. The Board Articulates No Prejudice or Basis for Any Sanction

Finally, there is no prejudice to the General Counsel justifying further evidentiary sanctions. The only concrete example the General Counsel's office articulates in its Motion regarding "problems" with the production are based entirely on misrepresentations.

The General Counsel's request for further evidentiary sanctions for insufficient document production is based on the gross misrepresentation that Starbucks has said it is "likely to . . . produce[] . . . some 20 million responsive documents." (Motion, p. 3). Starbucks has repeatedly noted that the General Counsel's overly broad subpoenas will "potentially implicat[e]" up to 20 million documents for Starbucks to have to "locate, retrieve, and review." (Starbucks' Opposition to GC's Motion for Evidentiary Sanctions, pp. 1 & 4). That is why the overbroad requests created an undue burden.

Starbucks has produced 5,012 pages of documents prior to the instant renewed motion being filed. It will continue to produce documents throughout the end of the month and beyond as promised. There is clearly no prejudice to the General Counsel as Starbucks continues its production.

It is telling that the General Counsel requests sanctions that would be tantamount to a ruling in her favor on the merits.[3] (Motion, p. 19). That the General Counsel did not go to federal court to enforce any allegedly deficient response, and instead asked Your Honor for these draconian sanctions, reveals her belief that she can pressure you – simply through repetition, misrepresentation, and hyperbole - into handing her a victory without having to put on her case on the merits and without having to connect any alleged missing document to a particular detriment to her case.

[3] The first sanction requested would prohibit Starbucks from cross-examining the General Counsel's witnesses at all – not just about a particular unproduced document, but rather about any "subject" related to any unproduced document. In other words, if Respondent doesn't produce even one page of a particular document related to anyone's termination, then it would be barred from cross-examining any alleged discriminatee about his or her termination. This is nonsense. Particularly because General Counsel has all relevant documents in her possession and has failed to identify a single document that she does not have access to. Similarly, she attempts to lay the groundwork to strike Respondent's answer to obtain unwarranted admissions, and to obtain inferences in her favor, if Respondent arguably does not produce any particular unspecified document and that document is arguably related to some allegation in the complaint. This, too, is nonsense.

There was no reason for the General Counsel to file its renewed motion – much less any legal authority or basis to grant the General Counsel's Motion and issue sanctions. Instead, it is Starbucks that is prejudiced by the General Counsel's continued frivolous request for sanctions, in the middle of trial, and when attempting to defend the 300 allegations that the GC brought. The General Counsel's Motion must be denied.

III. Conclusion

Accordingly, the Court should deny the General Counsel's Renewed Motion for Evidentiary Sanctions.

Dated: July 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was e-filed on July 29, 2022, through the Board's website and served via email to the following:

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